No. 2531

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK L. TOBEY AND RETTA M. TOBEY, HIS WIFE, AUGUSTA M. TOBEY, AND WILLIAM L. TOBEY,

Appellants,

vs.

EDWARD C. KILBOURNE, ET AL.,

Appellees.

Appeal from the United States District Court for the District of Oregon.

Appellees' Brief

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SCHWAB PRINTING COMPANY

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Statement of the Case

This case in a nutshell is as follows:

The Tobeys were country merchants at Olex, Oregon in the dry farming wheat district of Gilliam County. They owned about four thousand acres of land there. Discouraged by several years of poor crops and desirous of leaving that country, they traded their four thousand acres of land for

some irrigation bonds which they knew to be more or less of a speculative character. This is plain enough from the fact that their ranch, with the equipment, was worth in the neighborhood of sixty thousand dollars, and they got in exchange for it one hundred and forty thousand dollars in bonds. The irrigation project failed, the bonds became practically valueless, and the Tobeys tried to get their land back by bringing this suit, charging fraud against the Kilbournes, who had succeeded to the title to the land. The man to whom the Tobeys traded the land for the bonds was DeLarm, the promoter of the irrigation project. The Kilbournes bought the land from DeLarm and paid a valuable consideration in full, without notice of any fraud.

The foregoing is the briefest possible statement of the case. A more detailed history of it follows:

Defendants E. C. Kilbourne and C. A. Kilbourne were the principal stockholders in a corporation known as the Kilbourne & Clarke Company, a Washington corporation, with headquarters at Seattle, engaged in the business of furnishing electrical supplies and machinery and installing pumping plants for various irrigation projects. DeLarm and Biehl were the principal stockholders in a corporation known as the Columbia River Orchards Company, which had an irrigation project at Wahluke, on the upper Columbia River. Their plan was one quite common in the irrigation business

when that was flourishing a few years ago. They entered into contracts with settlers by which the settlers agreed to pay a certain amount per acre for water and to mortgage their lands or desert land filings as security in payment for the water. DeLarm and Biehl then attempted to finance the project by issuing bonds with these "water mortgages" and some real estate of their own at Wahluke as security. DeLarm was apparently a smart, energetic man who inspired confidence in all whom he came in contact with. Biehl was more or less of a nonentity. DeLarm was the real head. The project was feasible and meritorious and there is no doubt that for some time DeLarm was perfectly honest and proceeded along the recognized lines of business in financing and executing projects of this kind. He issued three hundred thousand dollars of bonds and had one of the best trust companies in Seattle act as trustee. It was the trust company connected with Dexter-Horton National Bank. At this time everything was square and above board. It was later on, probably in the latter part of 1911, that DeLarm went wrong and swamped the project by issuing unlimited bonds against it, and, according to the undisputed testimony in this case, forged securities for the bonds and generally went to the bad. He is reported to have died some place in California while evading search by the Federal authorities, who wanted to prosecute him for use of the United States mails to defraud. Biehl,

his partner, was so prosecuted and convicted. So much for the DeLarm side of the case.

Reverting now to the Kilbournes, DeLarm made a contract with their company, the Kilbourne & Clarke Company, by which that company was to build the pumping plant at Wahluke. This was early in 1910, long before DeLarm went crooked. The contract contemplated erecting a concrete pumping station and installing the necessary machinery therein, including the pipes leading from the Columbia River up to the irrigation ditch, but did not include building any irrigation ditches. That part of the work was let to another contractor named Fox. Before going ahead with this contract, the Kilbournes went to DeLarm's office and asked for a statement of his financial resources. DeLarm showed them a statement of assets approximating nine hundred and sixty thousand dollars and against this, as liabilities, three hundred and some odd thousand dollars, leaving the approximate net assets at, say, six hundred thousand dollars. The three hundred thousand dollars of liability was the authorized bond issue already mentioned, and this DeLarm represented to be practically sold to a bonding house in Chicago. The Kilbournes verified the statement about the bonds by inquiring from A. L. Funk & Company, who were the Seattle agents for the Chicago bond house, and A. L. Funk & Company confirmed DeLarm's statement that the bond issue was practically sold and

only a few small details as to securing a right of way for ditch and clearing up some titles remained to be done before the money would be realized.

The Kilbournes, satisfied with their investigations, and inspired with full confidence in DeLarm, then commenced work under their contract to construct the pumping plant, and did about ten thousand dollars' worth of work. For this DeLarm owed them five thousand dollars then and five thousand dollars due next month when a sudden rise in the Columbia River necessitated going ahead with the work night and day under full pressure. They had a talk with DeLarm and although he had not made the earlier payments as had been expected, he convinced them that he would very soon have the money, and they decided to go ahead with the contract and protect the work against the rising water. They did so until they had expended about forty-seven thousand dollars against which DeLarm had made some payments, reducing the net amount owing to the Kilbournes to the sum of approximately $43,000. In this state of affairs, the work having been protected against the high water, the Kilbournes, in July, 1910, shut down work because DeLarm could not pay them as the work progressed, as had been contemplated in the contract. The Kilbournes kept a watchman on the job and did a little work here and there until September, 1910, but practically they shut down in July of that year.

It should be noted in passing that under the pressure of work, due to the high water, when the

Kilbournes had strained every resource to keep things going, they had employed the Puget Sound Bridge & Dredging Company, as a sub-contractor, to do the excavation and erect the pump building, and had also employed the Moran Company as a sub-contractor, though in a comparatively minor capacity. The result of the shutdown in July was the Kilbournes were left owing the Puget Sound Bridge & Dredging Company and the Moran Company some twenty-five thousand and twenty-five hundred dollars, respectively. These amounts are approximate. It is necessary to know this in order to understand some of the later transactions.

In February, 1911, DeLarm came to E. C. Kilbourne and said that he had contracted to purchase about five thousand acres of land in Oregon, that he thought it afforded the basis for a fine irrigation project because the land was cheap and could be watered by gravity flow instead of by pumping and he requested Dr. Kilbourne to come with him and examine it as a soil expert and irrigation engineer. This land was the Tobey ranch. Dr. Kilbourne went with DeLarm and they were joined in Portland by W. L. Tobey, and proceeded to the ranch in Gilliam County, Oregon, examined it, particularly with a view to its being watered from Rock Creek, and Dr. Kilbourne returned to Seattle.

About the 6th of March, 1911, DeLarm came to Dr. E. C. Kilbourne and asked him if he wouldn't take the Tobey ranch in payment for the Kilbourne

& Clarke Company's debt of forty-three thousand dollars and going ahead and finishing the plant at Wahluke. The Kilbournes wouldn't do this at first, but on the 8th of March reached a tentative understanding with DeLarm that they would take the ranch over as security for the claim of the Kilbourne & Clarke Company and for the expenses they would incur in finishing the plant. But a little later they abandoned this idea, and finally reached the following agreement with DeLarm: E. C. Kilbourne and C. A. Kilbourne agreed to assume, as individuals, the indebtedness of forty-three thousand dollars, which DeLarm owed the Kilbourne & Clark Company, and further agreed, as individuals, to complete the pumping plant at Wahluke (the cost of completion being estimated at sixteen thousand dollars), and to install a second pumping unit at any time within a certain period, when demanded to do so by DeLarm. The Kilbourne & Clarke Company had gone out of active business December 31, 1910, and the agreement by the Kilbournes, just outlined, was made by them as individuals. DeLarm on his part agreed to turn over to them the Tobey ranch and equipment and to pay seventy-five hundred dollars on the Puget Sound Bridge & Dredging Company account and to pay the Moran Company's account, amounting to about twenty-two hundred dollars, both of these accounts being debts for which the Kilbourne & Clarke Company, as well as DeLarm, was liable, and the Kilbournes agreed that when DeLarm paid these accounts of the Dredging

Company and the Moran Company the Kilbournes would release two pieces of property in Tacoma which DeLarm had given the Kilbourne & Clarke Company as security.

In the meantime the transactions between DeLarm and the Tobeys, of which the Kilbournes knew nothing at that time, but which appear in the evidence in this case, were as follows:

DeLarm had offered the Tobeys one hundred and twenty thousand dollars of the irrigation bonds in exchange for their ranch and equipment. W. L. Tobey, the elder and leader of the two Tobeys, made a trip to Seattle to investigate the bonds and found that the bonds were generally regarded in Seattle as good, though of a speculative character, and was told by a bond broker named Gunn, to whom he was referred by DeLarm, that the company had enough property to pay out about eighty or eighty-five cents on the dollar on the bonds. With this information W. L. Tobey went to DeLarm and said that if he traded for the bonds he would have to have thirty-five dollars an acre for his ranch instead of twenty-five dollars, which had been the asking price theretofore. DeLarm regarded this as too much for the land, and after some haggling back and forth agreed to give the Tobeys one hundred and forty thousand dollars in bonds, as payment for the ranch and equipment, and the Tobeys accepted this offer. It was also a part of this bargain that DeLarm should lend the Tobeys six thousand

dollars and take back as security twelve thousand dollars in bonds.

To carry out this deal the parties met in Portland on March 15, 1911. There were present the Tobeys, DeLarm, one of DeLarm's men named Hodges and E. C. Kilbourne, the latter having come down from Seattle the night before. When it came to executing the deeds, DeLarm explained to the Tobeys that he was transferring the land to the Kilbournes in payment for the pumping plant complete, and requested the Tobeys therefore to make the deeds out direct to E. C. Kilbourne, which they did. The same thing was done with the bill of sale of the personal property. It was made direct to E. C. Kilbourne, all the parties being present, all acquiescing, and the Tobeys understanding exactly what was being done and why it was being done. The deeds, after being made out to E. C. Kilbourne, were, with the bonds, put in escrow in Hartman & Thompson's bank, pending the making of the loan of six thousand dollars to the Tobeys, which was part of the agreement, and also pending some little fixing up of the title, and were delivered out of escrow to E. C. Kilbourne on March 24, 1911.

Dr. E. C. Kilbourne shortly after deeded the property to his partner, C. A. Kilbourne, partly for convenience in making the mortgage to Balfour, Guthrie & Company, hereinafter mentioned, and partly because C. A. Kilbourne had advanced about seventy-two thousand dollars to the Kilbourne & Clarke Company, and it was felt that it should

therefore go to him, although E. C. Kilbourne still had an interest in the property in proportion to the money which he, too, had coming from the Kilbourne & Clarke Company (p. 496). It is not pretended by us that C. A. Kilbourne stood in any different relation as far as being an innocent purchaser than did E. C. Kilbourne. They were partners and what one knew the other knew, and for the purposes of this case they may be considered as holding the property together.

The Kilbournes then immediately started to work to complete the pumping plant and did complete it all but a small section of the intake pipe, which they postponed completing until the water should fall in the Columbia River and afford a better opportunity for doing it. They completed the pumping plant, with the exception of this small part of the intake pipe, in June, 1911, and the cost of the completion was seventeen thousand dollars, in round numbers, in addition to the forty-three thousand dollars already spent. To obtain the money to complete the plant, the Kilbournes mortgaged the Tobey ranch to Balfour, Guthrie & Company for twenty thousand dollars. They tried to obtain a loan of thirty-two thousand five hundred dollars, but Balfour, Guthrie & Company appraised the ranch at fifty-two thousand dollars, and the most they would lend the Kilbournes on it was twenty thousand dollars.

In September, 1911, DeLarm came to E. C. Kilbourne and said that he was anxious to get some

money to pay for the right of way for the ditch and for some land of the Northern Pacific in the project, and that he also wanted to do something to get the Puget Sound Bridge & Dredging Company to release the lien which they had put on the pumping plant, and that the Puget Sound Bridge & Dredging Company wouldn't accept anything but cash. DeLarm therefore proposed that the Kilbournes place a second mortgage of seventeen thousand five hundred dollars on the Tobey ranch and that of this seventeen thousand five hundred dollars ten thousand dollars should go to DeLarm in consideration for which he would release the Kilbournes from their obligation to install the second unit and from their obligation to complete the intake, the completion of which, it was estimated, would cost from one thousand to fifteen hundred dollars, and DeLarm further proposed that the seventy-five hundred dollars remaining of the money realized by the second mortgage should be paid to the Puget Sound Bridge & Dredging Company, and they would then release their lien, and DeLarm said he knew a party who would take the second mortgage and named him—Mr. Alexander Wakefield. The Kilbournes accepted this proposition. They were really out of the contracting business now and were therefore willing to pay the ten thousand dollars to be released from their obligation of installing the second unit and to complete the intake. The seventy-five hundred dollars due the Puget Sound Bridge & Dredging Company the Kilbournes

were primarily liable for, anyway, and though it was in the final analysis a debt of DeLarm's and one which he had agreed to take care of, yet the Puget Sound Bridge & Dredging Company was threatening to take a judgment against the Kilbourne & Clarke Company, and rather than have this the Kilbournes were willing to pay the seventy-five hundred dollars to the dredging company and to look to DeLarm for its ultimate repayment to them. Therefore, the mortgage was made by C. A. Kilbourne to Wakefield, and Wakefield placed it of record. Wakefield, following the usual custom of mortgagees, refused to pay over any money until the mortgage was placed of record, but when it was placed of record he did not pay over all the money. Apparently (the evidence is not very clear on this) Wakefield paid DeLarm some of the ten thousand dollars, but not all, and compelled DeLarm to take a heavy discount. The seventy-five hundred dollars, which was to have gone to the Kilbournes to pay the Dredging Company, never was paid by Wakefield, and he still owes it, although the Kilbournes consulted their attorneys, McClure & McClure, of Seattle, and instructed them to do everything they could to get the money. The result, therefore, of these transactions was that the Kilbournes placed a second mortgage on the ranch of seventeen thousand five hundred dollars, obtained a release from completing the second unit and completing the intake, but were left still owing

the Dredging Company the seventy-five hundred dollars.

Early in 1912 DeLarm's bubble burst. At that time it was a surprise to everybody—the Kilbournes and the Tobeys, as well. As we look back on it now, with the evidence adduced in the government prosecution against Biehl and the evidence in this case before us, we know that DeLarm had gradually been going from bad to worse, had been led from one false step to another, until he swamped his irrigation project with an unlimited issue of bonds, forged securities, and finally, sometime in 1912, became a fugitive from justice. It must always be remembered, in considering this case, that DeLarm started out honestly, that his deception and decline were gradual, and that at the time of the Tobey deal his bonds were actively traded in in the Seattle market, largely for property, it is true, and not for cash, but still extensively traded in and regarded as of good value, though, of course, like all irrigation bonds, speculative. It was not until later that he ruined himself and his business by issuing bonds in unlimited quantities.

At the end of January, 1912, when the Tobeys found that their bonds were worthless, they consulted their lawyer and the result was this suit, in which they charged the Kilbournes with having been co-conspirators with DeLarm in a gigantic scheme to defraud. We think your Honors will con-

clude, after reading the evidence, that the only reason the Kilbournes are charged with fraud is that they happened to be the ones who now own the Tobey lands and the Tobeys cannot get their lands back without crying fraud against the Kilbournes. So far as any evidence goes connecting them with such fraud, we think your Honors will agree with Judge Bean that none whatever has been shown.

The Kilbournes, in the meantime, had bought thirteen thousand dollars' worth of new equipment for the ranch and improved its cultivation, and yet had made nothing, but had sustained a loss, as appears from C. A. Kilbourne's testimony (pp. 507-509, and Defendants' Exhibit V, p. 684).

Argument

Any extended argument of this case, after the full statement we have made, seems unnecessary, and after your Honors have read the testimony of the two Tobeys and the two Kilbournes and Judge Bean's opinion, we doubt whether you will feel the necessity of reading this argument. One or two things we should like to mention, however, which seem to come more fittingly in the argument than in the statement of the case, and they are these:

It is vital to a correct understanding of this case to get a mental picture of how things looked to the Kilbournes and the Tobeys and the other participants back in 1910 and 1911 and not form a picture by everything that we know now. It would

be the greatest mistake to take all the evidence which the United States' special agents dug up in the prosecution of Biehl and of which the Tobeys' counsel had the benefit in this case, to take the forged securities, the unlimited issue of bonds, the failure of the Wahluke project, the disappointed bondholders and the disappointed settlers, like the Koppens, who had expected water on their lands and a thriving irrigation community to grow up about them—it would be a great mistake to take all these things which we know now, but which were all in the future in 1910 and 1911, and from them to make our mental picture and say, "The fraud is obvious and the Kilbournes must have known it." We must get back to 1910 and 1911 and see how things looked then. Your Honors all know the great popularity which irrigation projects of every kind had enjoyed for ten years previous to that time, a popularity which, to the far-sighted man, might have seemed destined to wane, but in 1910 was still vigorous and believed in by nearly everybody. The Kilbournes were the construction engineers for many pumping plants for irrigation throughout the Northwest and they had found the business successful and profitable, though later it collapsed. DeLarm came to them, a bright, energetic young man, with an irrigation scheme which, in spite of all its vicissitudes, is still recognized to be perfectly feasible. Better to understand all of the Kilbournes' actions throughout this case, it is necessary to know something of the character of DeLarm. It is the universal testi-

mony of all who came in contact with DeLarm that he inspired great confidence. Even W. L. Tobey, the chief plaintiff in this case, says: "Mr. DeLarm impressed me quite favorably, being a bright young man, a man that inspired confidence. I had a great deal of faith in him from talking with him" (p. 101). Again he says: "Because in talking with DeLarm and with the other people that I met (referring to this trip of investigation to Seattle) they impressed me as people that were square and honest and I had faith in what they were saying" (p. 125). His brother, F. L. Tobey, says the same, that he took them to be "honest, reliable men" (p. 340). E. C. Kilbourne says that "Mr. DeLarm inspired perfect confidence" (p. 440). C. A. Kilbourne says that he certainly had a good deal of faith in Mr. DeLarm—"He impressed me very favorably, indeed" (p. 519). Again C. A. Kilbourne testified on cross-examination as follows: ,

> "Q. From the experience you had had with DeLarm up to that time (the time of the Wakefield mortgage in September, 1911), you had found out he wasn't very prompt in his payments?
>
> A. Mr. DeLarm's promises were seldom carried out. Whatever he put out as statements of facts to us whenever we made any attempt to verify it, was always borne out. We never caught DeLarm in a deliberate lie, and we had a good deal of confidence in him.
>
> Q. Well, you did find out along the line, though, that a whole lot of those statements were not true?

A. Not what he put out as statements of facts to us. Everything we investigated—for instance, when he borrowed $3,000 from the company, he said he would have that money come back in a certain time. We went and investigated and found it to be so. He said the Washington Trust Company was the trustee; we found that to be so. He made a great many promises that he never carried out, and still he had a way about him that up until January, 1912, I really believed the fellow was sincere and honest and would carry out his scheme" (p. 532).

It is apparent that DeLarm was more than ordinarily confidence inspiring. All who met him believed in him. As C. A. Kilbourne said, "he had a way with him." And the extent to which the Kilbournes trusted him is shown by the fact that they were willing to expend forty-seven thousand dollars in erecting the pumping plant at Wahluke, though during that time they were paid only about four thousand dollars, so that in effect they extended a credit to DeLarm of forty-three thousand dollars, and at another time actually loaned him in cash twenty-nine hundred and fifty or three thousand dollars (pp. 511 and 532).

This young man then came to the Kilbournes with an irrigation project, which is still recognized to be inherently a good one, explained his plan, which was one common in the irrigation business, namely, to issue bonds on the project, the security for the bonds being the "water mortgages" of the settlers on the project. That is, the settlers agreed

to pay one hundred dollars an acre for water, and gave mortgages on their lands or their desert filings as security. And these, together with some land owned by DeLarm's company, were the basis for the bonds. It was a plan of action which has been followed in almost every private irrigation project that has been successfully carried through in this country. It was reported on favorably by the engineer of the Chicago bond house. The bond house agreed to take DeLarm's issue of three hundred thousand dollars of bonds on DeLarm's compliance with certain minor requirements, and on this showing the Kilbournes agreed to build the pumping plant. Thenceforth they did not investigate DeLarm. They were the engineers to build the plant, and they went ahead with that. They knew nothing about his financial arrangements or his bond issue, after their first investigation when they found that three hundred thousand dollars in bonds had been authorized, and they supposed to the last that this three hundred thousand dollars in bonds was the total issue. When they had spent ten thousand dollars on the plant and DeLarm failed to make the payments according to the contract, it might be supposed that they would shut down. But the rising water in the Columbia made going ahead preferable, and DeLarm showed them how he would have the money to pay them, and they believed in him and went ahead. When they had gone ahead to the extent of forty-three thousand dollars and shut down work in June, 1910, because

DeLarm was unable to pay them, they still had the utmost confidence in the irrigation project and in DeLarm himself. They knew he was hard up, of course, but believed in him and in his ability to carry the project through eventually and never for a moment suspected his integrity. Indeed, at this time it is probable that DeLarm was absolutely honest and had not yet entered on his fraudulent practices.

If we have been successful in presenting to your Honors' minds a mental picture of this young man DeLarm—how he exacted confidence from all who met him—and if we have made you understand that the irrigation project which he had was really a good one and is still a good one today, if anyone will carry it out, we feel that we have made your Honors understand how the Kilbournes, after their first investigation of the project and of DeLarm's resources, never concerned themselves again with DeLarm's financial operations or bond issue, but accepted them as being honest as a matter of course, and went ahead with their own part of the work, namely, building the pumping plant; and let us state here, parenthetically, that they did build a good one. Not even the Tobeys deny that. Why should the Kilbournes have suspected DeLarm any more than the Tobeys did? W. L. Tobey is no child. He is a man well able to look after his own affairs, and he went over to Seattle in 1911 and made a careful investigation of DeLarm and his bonds, and having perfect confidence in DeLarm and believing

that his bonds would pay out at least eighty cents on the dollar, made his trade. And with one hunhundred and forty thousand dollars of those bonds in his hands—his whole fortune, as he testified, tied up in them—he rested perfectly easy all through the year 1911, perfectly confident that the bonds were good, and didn't discover that they were not good until January, 1912. If the Tobeys felt this way about DeLarm and his bonds, why should the Kilbournes have felt any ~~difficulty~~ differently? Why does counsel argue that the Kilbournes must have had such an acute knowledge of the fraud? The answer is, they had as much confidence in DeLarm as the Tobeys did; they didn't think they were dealing with a trickster.

THE AGREEMENT OF THE KILBOURNES TO COMPLETE THE PLANT WAS THE VERY THING WHICH WOULD MAKE THE BONDS GOOD.

Another thing that we should like to point out to your Honors in this case is that though DeLarm had had difficulties with his project and it had dragged for lack of cash, yet it was the very Tobey deal itself which was expected to remove those difficulties and make everything smooth sailing thereafter. And the reason the Tobey deal was expected to do this was because when the Kilbournes agreed to complete the pumping plant for the Tobey lands that would put the water in the ditches and would make the project a go and the bonds good. DeLarm

would then have carried out his contracts with the settlers, the project would be complete and the water mortgages on which the bonds were based would be good securities. The Tobeys understood this as well as anybody. DeLarm explained to the Tobeys on the 15th of March, the very day the deeds were executed, that he was turning over their land to the Kilbournes in payment for the completion of the pumping plant (p. ~~402~~ 137/145/162). In the words of E. C. Kilbourne: "I thought the company was now in good shape and would go right ahead and would be all right and a success." Referring to this statement, the Tobeys' counsel asked E. C. Kilbourne this question: "Now you said that you thought that now the enterprise would be a success. What did you mean by 'now'? What day or transaction do you refer to as making a success"? And Kilbourne answered: "The contract with E. C. and C. A. Kilbourne to complete the plant so that they could put the water in the ditch. Everything hinged on putting the water in the ditches" (pp. 403 and 404).

Touching this same point E. C. Kilbourne testified as follows: The opposing counsel had been trying to show that the Kilbournes knew DeLarm was hard up for cash—a thing they never denied. This testimony followed on redirect (p. 441):

> "Mr. Wood: There is one thing I might help opposing counsel in.
>
> Q. You shut down work as the Kilbourne-Clark Company because you didn't get paid?
>
> A. Certainly.

Q. And you knew you didn't get paid because they didn't have money, didn't you?
A. Sure.
Q. And you knew they were hard up?
A. Yes.
Q. And you supposed when you started your work and the water was going, that was the end of the difficulty?
A. Yes."

AT THE TIME OF THE TOBEY TRADE THE BONDS HAD A GOOD VALUE.

It must never be forgotten by your Honors that DeLarm's frauds and delinquencies and his unlimited bond issues occurred after the Tobey deal, and that, at the time he exchanged bonds for the Tobey lands the bonds had a real value and were taken by many reputable Seattle business men in exchange for real estate. They were considered generally at that time as good.

DISCUSSION OF SOME POINTS OF LAW RAISED BY APPELLANT.

Counsel for appellants has twelve points of law in his brief. We do not deem it necessary to discuss all of these, but one or two we should like to discuss, more particularly in respect to their application to the facts in this case.

APPELLANTS' POINT III. "One who purchases merely an equity cannot be a *bona fide* purchaser. The doctrine of *bona fide* purchaser is not applicable to the purchase of an equity."

This is a correct statement of the law, but has no application to this case where the Kilbournes became the holders of the legal title.

APPELLANTS' POINT IV. "Where, under or by virtue of the assignment of a contract or option procured by fraud or by direction of the defrauding party, the deed is made direct to a third person, such third person will not stand in any other or better situation than the defrauding party, and cannot be regarded as an innocent purchaser."

Citing

Torrey v. Buck, 2 N. J. Eq., 366;

Seibel v. Higham (Mo.), 115 S. W. 987, 129 Am. St. Rep. 510-11;

Bonelli v. Burton, 61 Ore. 429.

Torrey v. Buck was decided in 1840, and so far as we can find has never been cited since to sustain the position taken by counsel. And there is not a single authority cited in the opinion itself to sustain that position. The Chancellor, without any discussion, simply declared that the fact that Hamilton's name had been inserted in the deed could not constitute him a purchaser for value without notice. Even if this decision be taken as correct, we point out the following points wherein it differs from the case of the Kilbournes: In the *Torrey* opinion it is *nowhere stated* that Hamilton *was* without notice of the fraud practiced by Buck. Nor does

that appear to have been the defense. It is worthy of note that Buck and Hamilton *joined* in an answer, the gist of which was that Torrey had had ample opportunity to investigate the stock he was trading his property for; that he, by his own admissions, knew it was a gamble; and that both defendants had refrained from telling him anything about the value of the stock when he asked them.

Another indication that the defendant Hamilton was actually a party to the fraud is that he himself furnished part of the consideration which proved worthless—the Trafton note—in which Buck was interested with him (though in fairness it should be stated that the court refused to hold the Trafton note fraudulent). The trend of the opinion, to our mind, shows that Hamilton and Buck were conspirators in the deal and that Hamilton knew of Buck's fraud.

Now, on the question of *bona fide* purchaser, all that the opinion says is that:

> "The case has been embarrassed somewhat by the introduction of a third party, the defendant Samuel H. Hamilton, to whom the deed for the property, at the instance of Buck, was finally made by the complainant; and yet I do not see how it varies the case. The bargain was made between the complainant and Buck; this is admitted by the defendants' answers; and the deed made on such bargain, by direction of Buck (who had made a further contract with Hamilton), directly to him to avoid multiplicity of deed. Hamilton cannot claim, in such case, to stand in any other or better

> situation than Buck would, had the deed been made to him. The conveyance is made on the contract entered into between the complainant and Buck, and the *mere substitution* of the name of another person, at the instance of Buck, cannot place that person in the situation of a *bona fide* purchaser without notice."

The "mere substitution." We agree with that. The "mere substitution" of Hamilton's name could not make him a *bona fide* purchaser. Other elements were necessary and these were apparently lacking. But *if* Hamilton had actually concluded a bargain with Buck to take the property, and actually paid for it and received a deed for it without notice of Buck's fraud, then we think there is no doubt he would have been a *bona fide* purchaser, even though the deed was made direct from Torrey to Hamilton. Otherwise, what becomes of the equitable doctrine that equity regards that as done which ought to be done? The court, to do equity, ordered that Hamilton be refunded all he had paid and restored to his former condition.

In the case at bar, if your Honors should restore to the Tobeys their lands, equity would require that the Tobeys save the Kilbournes harmless as to all that the Kilbournes have done, relying on the consent of the Tobeys to the deed (unless the Kilbournes are parties to the fraud). To be specific, it would require the repayment of the original consideration and the taking over at cost the lands subsequently acquired by the Kilbournes on the strength of their ownership of the Tobey land and

the expenditures in machinery and plant necessitated by their ownership of this land, and made in good faith.

In the case of *Seibel v. Higham,* a deed had been placed in escrow and the grantor died. The grantee never complied with the terms of the escrow and gave up any idea of taking the property. Long after the time of the escrow had expired, Higham, representing himself as the agent of the grantor, and never telling the escrow holder that the grantor was dead, obtained possession of the deed. Of course, the deed thus obtained was *void,* not merely voidable; it conveyed no more title to anybody than it would have if Higham had stolen it, as the court remarked. It would be enough to dispose of this case to point out that the pretended innocent purchaser deraigned his title through this *void* deed and as such a deed can convey no title to anyone, no matter how innocent he is, the case is not in point.

But counsel has quoted another part of the opinion and we will analyze that. Higham and a confederate named Meyer, holding under the void deed, gave an option to a man named Graham, who, being unable to pay the purchase price, transferred his rights under the option to Barnard (the innocent purchaser), who paid the price to Higham and Meyer and took a deed. Graham knew of Higham's fraud, Barnard did not. The court held Barnard not a *bona fide* purchaser, because he merely stepped into Graham's shoes and, using the rights of Graham's option, continued Graham's deal and

brought it to a consummation. But the court said that if Graham had *himself* completed the deal and then turned around and in a *new transaction* sold the property to Barnard, the case would have been different.

We do not approve of this reasoning. We think that Barnard (aside from the deed being *void*) should have been held a *bona fide* purchaser whether he continued Graham's transaction or bought from Graham as a new deal. But however that may be, it is obvious that this case is quite distinguishable from the case at bar for the reason that the Kilbournes were by no means the continuors of DeLarm's transaction with the Tobeys. DeLarm made his independent deal with the Tobeys and completed it all but the receiving of the deed. *He* paid the Tobeys the bonds, not the Kilbournes, and when he had closed the deal, with the exception of the delivery of the deed, he then turned around and made a new and distinct bargain with the Kilbournes, and in equitable effect took the deed, which the bill alleges was delivered to him, and delivered it to Kilbourne; in equitable effect being a reconveyance by him to Kilbourne, for equity looks at the intent, and this was the intent of all parties.

It seems to us that the Torrey case may be distinguished in the same way.

Bonelli v. Burton, 61 Ore. 429. It is enough to dispose of this case to say that the defense of a *bona fide* purchaser was not pleaded or relied upon at all. (See 61 Ore., p. 437, par. 9.)

For cases which hold that an innocent purchaser will not be deprived of that position because he took a deed direct from the defrauded person instead of through the channel of the defrauder, see

McCleary v. Wakefield (Iowa), 41 N. W. Rep. pp. 210, 211, first column.

Hall v. Kary (Iowa), 110 N. W. Rep. 930, 931.

Augustine v. Schmitz (Iowa), 124 N. W. Rep. 607.

Clemmons v. McGeer (Wash.), 115 Pac. Rep. 1081, 1082, 1083.

In these cases the original grantor was not present and acquiescing when the deed was filled in with the name of the innocent third party. How much stronger is the case at bar in favor of the Kilbournes, where the Tobeys were actually present and, being informed fully of the reason why DeLarm was transferring the land to the Kilbournes, consented to the deed being filled in with Dr. Kilbourne's name to save the trouble of making duplicate deeds.

If there is anything at all to the maxim that equity regards that as done which ought to have been done or was intended to be done, then your Honors must consider this case exactly as if the Tobeys had executed a deed in favor of DeLarm and DeLarm had in turn conveyed by deed to Dr. Kilbourne.

The whole reason why equity will not protect the innocent purchaser of a mere equity is because where the equities are equal, the one prior in time will prevail. But when the purchaser of an equity also acquires the legal title, without notice of fraud and for value, then he is protected under the maxim that equity follows the law, or where the equities are equal the law will prevail. A court of equity will act only on the conscience, and where the holder of a legal estate has acquired it for value and without taint to his conscience, a court of equity simply has nothing to operate on. (Warvelle on Vendors, 2d Ed., Sec. 606.) When he has acquired the legal title honestly it makes no difference whether the deed has come direct from the defrauded party or from the defrauder.

It seems to us that it is misconception of this rule which has led counsel into this discussion of the rights of purchasers of equities.

APPELLANTS' POINT V.

"Where fraud is proved, and the defendant relies upon a defense that he is a *bona fide* purchaser, he must allege and prove that he was a *bona fide* purchaser for a valuable consideration paid without notice of a fraud, or of such facts as would put a reasonably prudent man upon inquiry, and the burden is on him to prove it."

This point raises the question of burden of proof, which is a very important question in this case, and necessitates a consideration of what the

bill in this case charges. It does not charge that DeLarm defrauded the Tobeys, and that the Kilbournes, though innocent of the fraud, knew of it when they took title to the lands and therefore cannot be innocent purchasers. That isn't what it charges at all. If it had charged that, the burden would be on the Kilbournes to show that they were innocent purchasers, but that isn't the theory of the bill. The bill is that the Kilbournes were active partners with DeLarm and entered into a conspiracy to defraud the Tobeys. The bill charges them with being active participants in the scheme to defraud and charges them with the fraud as directly as it charges DeLarm. If your Honors read the bill you will find these allegations: "That the said W. E. DeLarm, with his associates, including all of the defendants herein, except possibly W. J. Burns, *entered into a gigantic scheme to defraud your orators,* as well as all other persons with whom he and his associates dealt" (page 15). "That the defendants, W. E. DeLarm, Edward C. Kilbourne, Charles A. Kilbourne (and others, naming them), *conspired and confederated together for the purpose of defrauding your orators* and other persons with whom they dealt; that the said defendant, W. E. DeLarm, dominated and controlled said corporations made parties defendant hereto, as well as the individuals named herein as defendants, *and they were all instruments in his hands or acting with him for the purpose of perpetrating the frauds* which culminated in the transactions with which

they had been connected with your orators, as well as other persons" (pp. 15 and 16). "That the said Edward C. Kilbourne and Charles A. Kilbourne, to whom the said Edward C. Kilbourne conveyed the lands of your orators, knew at all times all about the business which was being conducted by the said W. E. DeLarm and all of the said corporations which are made defendants herein and *knew the whole scheme as well as W. E. DeLarm himself, and they were confederates with him in the business* and when the deeds were made and delivered to the said Edward C. Kilbourne he had knowledge of all the business in which the said W. E. DeLarm was engaged and was not at all an innocent purchaser, *and acted with the said W. E. DeLarm to induce your orators to convey the land to him as a trustee or agent for the said W. E. DeLarm and his company.*

"That no consideration at all whatever passed between the said Edward C. Kilbourne and your orators, but the deeds were made to the said Edward C. Kilbourne *with the express understanding that he was an agent and trustee of the said W. E. DeLarm,* with whom the original contract was made, *and was acting for him.* And the said Charles A. Kilbourne knew, at the time said deed was executed and delivered to him, of all the transactions" (pp. 16 and 17). Your Honors will see that the bill charges not that the Kilbournes took the land with knowledge of a fraud, in which they had had no hand, but charges the fraud directly against

them; says that they were in a confederacy with DeLarm to cheat the Tobeys out of their lands.

Now, isn't the burden on the complainants to prove these charges? The complainants must win on the strength of their bill and their proof, or not at all. They cannot charge direct, active fraud against us and then, when they have failed in their proof, say that the burden is on us to prove ourselves innocent purchasers. They cannot do this even though the defense of innocent purchaser is set out in the answer. The complainants must recover on the case made in their bill, and no decree can be entered which is not *secundum allegata et probata,* and they cannot recover on the strength of their adversaries' answer.

> "Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defect will be fatal. For no facts are properly in issue unless charged in the bill; and of course no proofs can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the court pronounces its decree *secundum allegata et probata.*"
>
> Story's Equity Pleadings (8 Ed.), Sec. 257.

> "The Decree Must be *Secundum Allegata.* The General Rule. Although the plaintiff may make out by proof a case which entitles him to relief, yet he can have no decree unless the allegations of the bill are adapted to the case proved, for the court pronounces its decree *secundum allegata et probata.* And it is said

> that this rule is substantially adhered to with the same strictness in equity as at law.
>
> "Admissions in Answer. No admissions in an answer can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill."
>
> Ency. of Pleading and Practice, Vol. 3, p. 357.

What proof is there of conspiracy and fraud on the part of the Kilbournes? The complainants combed the States of Oregon and Washington for evidence, and had all the advantage of the labors of the United States Secret Service in the Biehl case; with what result? Judge Bean sat through days of testimony wherein DeLarm was tried, but the Kilbournes were never touched.

It is elementary that the proof of fraud must be clear and convincing. Every presumption is in favor of innocence.

Mr. Justice Miller said in *Maxwell Land Grant Case,* 121 U. S. 325, p. 381; 7 Sup. Ct. Rep., p. 1029:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

See also *Lalone v. U. S.,* 17 Sup. Ct. Rep., pp. 74, 75, and *U. S. v. American Bell Telephone Co.,* 17 Sup. Ct. Rep., p. 809, and cases cited.

Suppose the defendants Kilbourne had moved for a dismissal at the close of complainants' case? Can your Honors feel that the proof that the Kilbournes had "conspired and confederated" with DeLarm to defraud the Tobeys was so clear as to warrant a cancellation of the Kilbourne deeds? And if not, has the testimony of the Kilbournes increased the proof of fraud? Obviously not.

The complainants have simply failed to establish the facts alleged in their bill. And they cannot win on any facts or defences set up in the answer.

Story's Equity Pleading, 8th ed., Sec. 264.

Ency. Pleading and Practice, Vol. 3, p. 358.

No defense of a *bona fide* purchaser was necessary.

This, we think, should dispose of appellants' point V.

Inasmuch, however, as the answer does, in effect, set up the defense of *bona fide* purchaser and we put the Kilbournes on the stand and had them tell their story and counsel says that we, as *bona fide* purchasers, must prove a valuable consideration paid without notice of a fraud, we ask your Honors to read the testimony of the two Kilbournes and then ask yourselves whether there can be any doubt about their having sustained the burden of proof that counsel says is on them. Every act they did shows their honesty, their belief in the success of the project and in DeLarm himself, and their entire absence of any suspicion whatever that DeLarm was

tricky. They have not only testified to this, time and time again, but their acts show it. Would they have spent forty-seven thousand dollars of their own money on the plant at Wahluke with payments of only four thousand dollars from DeLarm if they had thought he was tricky? Would they have loaned him three thousand dollars cash? Would they have written Glover, at the end of May, 1911, suggesting that he see whether he could trade his land for some of DeLarm's bonds, if they had thought DeLarm was a fraud and his bonds valueless? Counsel attempts, from this letter, to draw the inference that the Kilbournes were in a conspiracy with DeLarm to defraud Glover out of his lands and afterwards get it themselves. Judge Bean, however, drew the same inference that we did—that it was evidence of the Kilbournes' honesty and belief in DeLarm and the bonds. The presumption is always in favor of innocence. Man after man—substantial business men of Seattle—went on the stand and testified to the long-standing uprightness and good character of the Kilbournes. Is it supposed that men of that character would write the Glover letter with the intent in mind which the Tobeys' counsel attributes to them; especially since they must have known that if they had done so they would be liable to a criminal prosecution for using the mails of the United States to defraud? Again, as an evidence of their good faith, if they had been scheming with DeLarm to defraud the Tobeys, would they have taken the deeds from the Tobeys direct to themselves? No, they

would have had the Tobeys deed to DeLarm or somebody else who could act as a buffer and then had that person deed to them. The very act of paying De Larm the ten thousand dollars cash to be released from the construction of the second unit shows their complete innocence. Counsel says that all the consideration must pass from an innocent purchaser before he has notice of any fraud and says that the Kilbournes' failure to testify that they had no notice of any fraud before all the consideration passed, raises the presumption that they did have notice. As a matter of fact, they have testified on the point plentifully, as we shall hereafter show. But better than mere words are their acts, among them the payment of this ten thousand dollars. If the Kilbournes had thought at any time that DeLarm had defrauded the Tobeys and that therefore the title to the Tobey lands might be attacked, do your Honors suppose that when DeLarm came to them and asked them to pay him ten thousand dollars to release them from the construction of the second unit, they would have accepted his offer? On the contrary, they would have said: "Mr. DeLarm, we have learned of your fraud. The title to the land which you gave us in payment for all our work and services and for the construction of this second unit is tainted with fraud and if we complete that second unit for you now, with notice of the fraud, the loss would be on us. You have cheated the Tobeys and in doing so you have cheated us and we stop right here, and you can whistle for your second unit as far as we are concerned." That

would have been the answer they would have made if they had known or suspected DeLarm of fraud. Instead of that they had the utmost confidence in the man and paid him ten thousand dollars to be released. Counsel will say: "Yes, but they got that money by placing a second mortgage on the Tobey land." True enough they did, but they are nevertheless personally liable on the mortgage notes just the same.

Why, way late in January, 1912, only a few days before DeLarm's exposure; to be exact, on January 25, 1912, long after all consideration had passed from the Kilbournes to DeLarm, they made an agreement with him that on payment of the seventy-five hundred dollars on the Puget Sound Bridge & Dredging Company account, with one thousand dollars attorneys' fees, and the twenty-seven hundred dollars which the Moran Company account then amounted to, they would have the Dredging Company satisfy and cancel of record the lien on the pumping plant which the Dredging Company had reduced to judgment, and would also surrender the Tacoma properties which the Kilbournes held as security for these amounts. Def. Ex. W-687. In other words, they were still proceeding on the lines of the original agreement, which does not look as if they had received notice of fraud. If they had received such notice, with the consequent knowledge that the Tobeys would probably try to take their lands back, is it likely that the Kilbournes would have made this agreement? Hardly. The Dredging Company's lien amounted to something

over twenty thousand dollars, and while the Kilbournes, as honorable men, would have paid the Dredging Company because they had agreed with the Dredging Company to be responsible to them, they would certainly not have been ready to release DeLarm from the lien on the payment of such a small sum as seventy-five hundred dollars. They would have maintained the lien to the last, so that on being subrogated to the Dredging Company's rights they could have some protection, and they would have held on to the Tacoma securities for the same reason.

APPELLANTS' POINT VII. "The burden is upon one claiming to be a *bona fide* purchaser to prove payment in full before notice."

True as a general statement, and we have proved it so fully that any discussion of this point of law seems superfluous. We might suggest this comment, however; there is always the equitable consideration of what amounts to full payment. What is *full* payment? If it be cash, the answer is easy; but suppose it to be services requiring the purchase of animals and tools, and transporting of men, and opening of a camp, and the engaging of experts—such as an engineer—would a court of equity say that all this must be abandoned, great loss sustained, and suits for breach of contract with others endured, merely because at some point in the proceeding notice of a fraud is given? It is equity's boast that it

is synonymous with justice and with good sense, and proceeds in each case to do the equity demanded.

Counsel's statement of the law needs this further modification, that where an innocent purchaser has paid part of the consideration before notice, and completed the remainder of it after notice, he must be reimbursed for that paid before notice by the parties seeking cancellation; or, as some cases have held, he may retain the lands and the plaintiff's remedy is confined to a recovery of that portion of the purchase money which was still unpaid when notice was given. Pomeroy's Equity (2nd ed.), Sec. 750. We think the testimony shows that the Kilbournes paid the entire consideration and completed the Wahluke pumping plant and were released from installing the second unit—before any notice of fraud.

APPELLANTS' POINT VIII. "One who takes as security of, or in payment of a pre-existing indebtedness, does not take for a good consideration."

True in some jurisdictions, not in others; but it has no application whatever here. The Kilbournes did not take the property as security, nor in payment of a pre-existing indebtedness. The preliminary negotiations were that the land should be taken as security for the DeLarm corporation's debt to the Kilbourne & Clark Company, but in the final deal the Kilbournes as individuals *assumed a new obligation*—the forty-three thousand dollar debt of DeLarm's corporation to the Kilbourne & Clark

Company—and agreed to complete the plant and to install an additional unit, all of which they did in equitable effect. The questions of security and pre-existing indebtedness were not involved at all.

APPELLANTS' POINT XI. "The failure of the defendants to testify to lack of notice or knowledge prior to the performance of their contract to complete the pumping plant, and prior to their release from their contract to install the second unit, warrants a presumption of notice."

The Kilbournes' entire lack of knowledge, both from all their testimony taken as a whole and from the acts which we have before referred to as indicating their innocence stronger than any words could do, is so clear that we almost feel like ignoring this point. Just to show, however, that counsel's statement that the Kilbournes were silent on this point is an unwarranted assumption, we quote the following:

E. C. Kilbourne said that the irrigation project was perfectly feasible; was all the time; that he had great confidence in the proposition and has today, and added, "I paid no attention to the bond issue whatever except on the early start, the very first proposition. The question of bonds came up through the conversation in which he (referring to DeLarm) said that the bonds of the company would be $300,000, were practically sold in the East. That is when Mr. Kilbourne and myself were investigat-

ing their resources" (p. 404). E. C. Kilbourne also said that, at the end of May, 1911, when he wrote the Glover letter, he thought the bonds were perfectly good, his testimony being as follows (pp. 436 and 437):

"Q. Now, at the time, May 27th, or the end of May, at the time you wrote this letter, did you believe those bonds good?

A. Yes.

Q. Why did you think they were good?

A. Because we had practically completed the pumping plant then, Fox was about through with the ditch, well along with it, and it looked as though things were going to be all right.

Q. You thought water would be in the ditch?

A. Yes, sir; we had then the machinery all in.

Court: Did you know how many bonds had been issued?

A. I supposed $300,000.

Court: That is what you thought when you wrote this letter?

A. Yes, sir, * * *."

C. A. Kilbourne said: ff 506-507

"Q. Mr. Kilbourne, did you or your company, directly or indirectly, have any connection with DeLarm and his projects other than your corporation was to build this pumping plant?

A. Never in any way, shape or manner. We knew nothing whatever of his inside affairs.

Q. Did you ever have any of these bonds offered you in payment?

A. Never presumed to offer us any bonds at all. He knew that we would not be able to carry bonds, couldn't take our pay in that way, and he never offered them.

Q. Did you know anything about the bonds or the value of them, and if you knew anything

state what it was and what your own belief was.

A. I knew nothing about the value of the bonds. I knew they had a good proposition and supposed there was $300,000 authorized, and that the property ought to be perfectly good for that issue."

And again he said, on cross examination (p. 522):

"Q. Didn't you know then, Mr. Kilbourne, up to the time that the thing collapsed, that is, during the pendency of it, the latter part of it, that they were unable to negotiate their bonds for money, either there in Seattle, or anywhere else?

A. No, I didn't know they were not able to. I knew they hadn't sold any so far for cash; that is, that I knew of. They may have sold some, but I mean to say, it hadn't been reported to me, and they still owed us money."

And again, on cross examination, he said, referring to DeLarm:

"Up until January, 1912, I really believed the fellow was sincere and honest and would carry out his scheme" (p. 532).

We only mention these brief extracts from the testimony because of counsel's statement that the Kilbournes did not testify on this point.

Further, the Kilbournes, in their affidavit opposing an interlocutory injunction, which affidavit has been introduced by the Tobeys as plaintiffs' exhibit 151, p. 653, said:

"I, E. C. Kilbourne, and I, C. A. Kilbourne, now say, each for myself, that at no time was

> I in the confidence of either the Tobeys or DeLarm, or anyone connected with them; that I had no knowledge of DeLarm's financial condition other than as given to me by DeLarm and as in a general way I knew from my acquaintance with the Wahluke irrigation project which, as already stated, seemed to me under proper handling to have the conditions for success."

The questions of fact which counsel has discussed in his brief we have not touched on. We take issue with counsel's analysis of some of the facts; particularly to his analysis of the consideration that passed from the Kilbournes to DeLarm, found on pp. 51 to 53 of his brief; but we are satisfied to have your Honors glean the facts from your own reading of the record without our prolonging this brief with a discussion of them.

One point we touch briefly. Counsel says that the Kilbournes never paid DeLarm's debt ~~on~~ of forty-three thousand dollars to the Kilbourne & Clarke Company which the Kilbournes, as individuals, assumed and agreed to pay. As a matter of fact the Kilbournes themselves were the principal stockholders in the company and the company went out of active business at the end of 1910. The company owed C. A. Kilbourne seventy-three thousand dollars (p. 492), and also owed E. C. Kilbourne an amount which is not stated (p. 496). In winding up the affairs of the corporation it is apparent that with the amounts due to the two Kilbournes, as individuals, which far exceeded the forty-three thousand dollar obligation which they assumed to pay the

corporation, such payment would be a mere matter of bookkeeping and striking a balance.

In conclusion we desire to remind your Honors of the great advantage that the trial judge has in hearing the witnesses face to face, and that it has always been recognized that the trial judge's decree should not be disturbed unless your Honors were satisfied from the printed record that his decree was wrong. We think that rule should be more strongly adhered to than ever in an appeal like this, brought under the new equity rules, where the testimony is not even before your Honors *verbatim,* but only in a condensed paraphrase.

Respectfully submitted.

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Erskine Wood,
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